

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:MAN:TL-N-3026-98-
DARosen 8287-97

date:

to: Director, LMSB Financial Services & Healthcare (Manhattan)
Attn: Revenue Agent Melvyn J. Birnbaum, Team 1113

from: District Counsel, Manhattan (CC:NER:MAN)

subject:

Tax Years: [REDACTED]
(Form 872 [Income])

Tax Years: [REDACTED]
(Form 872-F [Income])

Tax Years: [REDACTED]
(Form 872-P [Income])

Tax Years: [REDACTED]
(Form 872 [Form 1042 Withholding])
All Quarters: [REDACTED] Through [REDACTED]
Form SS-10 [Employment])

Tax Years: [REDACTED]
(Form 872 [Form 1042 Withholding])

All Quarters: [REDACTED] Through [REDACTED]
(Form SS-10 [Employment])

All Quarters: [REDACTED] Through [REDACTED]
(Form SS-10 [Employment])

Tax Years: [REDACTED]
(Form 872 [Income])

Tax Year: [REDACTED]
(Form 872 [Income])

Consents to Extend the Statute of Limitations on Assessment
UIL Nos. 1502.77-01, 6501.08-09, 6501.08-17, 6229.02-00

DISCLOSURE STATEMENT

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THIS ADVICE IS RENDERED ON THE BASIS THAT ALL REPRESENTATIONS AND FACTS IN THIS MEMORANDUM ARE CORRECT. WE RECOMMEND THAT YOU VERIFY THIS INFORMATION. IF ANY OF THE REPRESENTATIONS AND/OR FACTS ARE INCORRECT OR CANNOT BE SUBSTANTIATED, OUR ADVICE MAY NEED TO BE MODIFIED.

INTRODUCTION

This memorandum is in response to your request for advice concerning the proper entities to execute consents to extend the statute of limitations on assessment for the above-referenced taxpayers, as well as the proper language to be used in the consents. The earliest date that the statute of limitations on assessment will expire with respect to the above-referenced taxpayers is [REDACTED].

This memorandum is subject to National Office review and approval. Accordingly, the advice herein stated should be considered preliminary, and should not be acted upon until we contact you concerning National Office comments. We will so contact you within two weeks of the date of this memorandum.

FACTSI. Merger of [REDACTED] and [REDACTED]

On or about [REDACTED], [REDACTED], a Delaware corporation, and [REDACTED], also a Delaware corporation, entered into an Agreement and Plan of Merger (the "Original Merger Agreement") which they subsequently amended and restated in an Amended and Restated Agreement and Plan Of Merger dated [REDACTED] (the "Merger Agreement").

Pursuant to the Merger Agreement, [REDACTED] merged with and into [REDACTED], with [REDACTED] emerging as the surviving corporation, succeeding to and assuming all the rights and obligations of [REDACTED] in accordance with the Delaware General Corporation Law. The effective date of the merger was [REDACTED], and the name of the surviving corporation was subsequently changed to [REDACTED].¹

For the tax years [REDACTED] through [REDACTED], inclusive, [REDACTED] (E.I.N. [REDACTED]) was the common parent of an affiliated group of corporations and filed consolidated U.S. Corporate Income Tax Returns (Forms 1120) with its affiliates. For the tax years [REDACTED] through [REDACTED], inclusive, [REDACTED] (E.I.N. [REDACTED]) was also the common parent of an affiliated group of corporations and filed consolidated U.S. Corporate Income Tax Returns (Forms 1120) with its affiliates. According to the Merger Agreement and related documents, the parties intended that the merger qualify as a reorganization under the provisions of I.R.C. § 368(a)(1)(A). Based upon the information provided, [REDACTED] did not designate an agent to act on behalf of the consolidated group once [REDACTED] ceased to exist.

Section 01.01 of the Merger Agreement, in pertinent part, provides that:

Upon the terms and subject to the conditions set forth in this Agreement, and in accordance with the Delaware General Corporation Law, [REDACTED] shall be merged with and into [REDACTED] at the Effective Time (as defined in Section 1.03). Following the Effective Time, [REDACTED] shall be the surviving corporation (the "Surviving Corporation") and shall succeed to and assume all the rights and obligations of [REDACTED] in accordance with the Delaware General Corporation Law.

In addition; Section 2.01 of the Merger Agreement, in pertinent part, provides that:

Each share of [REDACTED] Common Stock and [REDACTED] Preferred

¹ However, by an amendment to its Certificate of Incorporation with an effective date of [REDACTED], [REDACTED] again changed its name to [REDACTED].

Stock that is owned by [REDACTED] or [REDACTED] shall automatically be canceled and retired and shall cease to exist . . . [and] each issued and outstanding share of [REDACTED] Common Stock shall be converted into the right to receive [REDACTED] fully paid and nonassessable shares of [REDACTED] Common Stock . . . As of the Effective Time, all such shares of [REDACTED] Common Stock shall no longer be outstanding and shall automatically be canceled and retired and shall cease to exist . . . Each issued and outstanding share of [REDACTED] Preferred Stock and shares of [REDACTED] ESOP Preferred Stock shall be converted into the right to receive one fully paid and nonassessable share of the corresponding series of [REDACTED] Preferred Stock.

According to Exhibit D of the Merger Agreement, "following the merger, [REDACTED] will continue the historic business of [REDACTED] or use a significant portion of its historic business assets in a business."

The Merger Agreement provides that it shall be governed by, and construed in accordance with, the laws of Delaware.

II. Acquisition of [REDACTED] by [REDACTED]

On or about [REDACTED], [REDACTED], a New York Corporation, and [REDACTED] entered into a Stock Purchase Agreement and a Trust Company Merger Agreement. Pursuant to the Stock Purchase Agreement, the applicable law is that of the State of New York. The Stock Purchase Agreement provided for the sale of [REDACTED] percent of the common stock of [REDACTED] and [REDACTED] to [REDACTED] for \$ [REDACTED].

Although we do not have a copy of the Trust Company Merger Agreement, the Stock Purchase Agreement indicates that immediately after the Closing on the stock purchase, [REDACTED], a New York Corporation, merged with and into [REDACTED]. The closing occurred on or about [REDACTED].

For the tax years [REDACTED] through [REDACTED], inclusive, [REDACTED] was a member of the [REDACTED] consolidated group.

ISSUES

1. Who is the proper individual to execute consents, on behalf of the taxpayer, to extend the statute of limitations on assessment for the taxpayer [REDACTED], an affiliated group, for pre-merger tax years with respect to income tax?

a. What specific language should be used on the consents to extend the statute of limitations on assessment for the taxpayer [REDACTED] and Consolidated Subsidiaries for the tax years [REDACTED] through [REDACTED], inclusive?

2. Who is the proper individual to execute consents, on behalf of the taxpayer, to extend the statute of limitations on assessment for the taxpayer [REDACTED] a subsidiary of, but not a member of an affiliated group with, [REDACTED], with respect to FICA (Form 941) and FUTA (Form 940) tax?

a. What specific language should be used on the consents to extend the statute of limitations on assessment for the taxpayer [REDACTED] for all quarters of [REDACTED] through [REDACTED], inclusive?

3. Who is the proper individual to execute consents, on behalf of the taxpayer, to extend the statute of limitations on assessment for the taxpayer [REDACTED] a subsidiary of, but not a member of an affiliated group with, [REDACTED], with respect to I.R.C. §§ 1441-1464 (Form 1042) tax?

a. What specific language should be used on the consents to extend the statutes of limitations on assessment for the taxpayer [REDACTED] for the tax years [REDACTED] through [REDACTED], inclusive?

4. Who is the proper individual to execute consents, on behalf of the taxpayer, to extend the statute of limitations on assessment for the taxpayer [REDACTED], a subsidiary of, but not a member of an affiliated group with, [REDACTED], with respect to FICA (Form 941) and FUTA (Form 940) tax?

a. What specific language should be used on the consents to extend the statute of limitations on assessment for the taxpayer [REDACTED] for all quarters of the years [REDACTED] through [REDACTED], inclusive?

5. Who is the proper individual to execute consents, on behalf of the taxpayer, to extend the statute of limitations on assessment for the taxpayer [REDACTED], a subsidiary of, but not a member of an affiliated group with, [REDACTED], with respect to I.R.C. §§ 1441-1464 (Form 1042) tax?

a. What specific language should be used on the consents to extend the statute of limitations on assessment for the taxpayer [REDACTED] for the tax years [REDACTED] through [REDACTED], inclusive?

6. Who is the proper individual to execute consents, on behalf of the taxpayer, to extend the statute of limitations on assessment of tax attributable to items of the partnership [REDACTED], of which [REDACTED], a subsidiary of [REDACTED], is a general partner?

a. What specific language should be used on the consents to extend the statute of limitations on assessment for tax attributable to items of the partnership [REDACTED] for the tax years [REDACTED], [REDACTED], [REDACTED], and [REDACTED]?

7. Who is the proper individual to execute consents, on behalf of the taxpayer, to extend the statute of limitations on assessment of tax attributable to items of the partnership [REDACTED] that have converted under I.R.C. § 6231(b) for the partner [REDACTED]?

a. What specific language should be used on the consents to extend the statute of limitations on assessment for tax attributable to items of the partnership [REDACTED] that have converted under I.R.C. § 6231(b) for the partner [REDACTED] for the tax years [REDACTED] and [REDACTED]?

8. Who is the proper individual to execute consents, on behalf of the taxpayer, to extend the statute of limitations on assessment for the taxpayer [REDACTED], an affiliated group?

a. What specific language should be used on the consents to extend the statute of limitations on assessment for the taxpayer [REDACTED], an affiliated group, for the tax years [REDACTED], [REDACTED], [REDACTED] and [REDACTED]?

9. Who is the proper individual to execute consents, on behalf of the taxpayer, to extend the statute of limitations on assessment for the taxpayer [REDACTED], [REDACTED], an affiliated group, for pre-merger tax years with respect to income tax?

a. What specific language should be used on the consents to extend the statute of limitations on assessment for the taxpayer [REDACTED], an affiliated group?

10. Who is the proper individual to execute consents, on behalf of the taxpayer, to extend the statute of limitations on assessment for the taxpayer [REDACTED] with respect to FICA (Form 941) and FUTA (Form 940) tax?

a. What specific language should be used on the consents to extend the statute of limitations on assessment for the taxpayer [REDACTED] for all quarters of [REDACTED], [REDACTED], and [REDACTED]?

DISCUSSION

I. Introduction

a. Extending the Limitations Period on Assessment

i. Tax Attributable to Corporations

In general, the statute of limitations on assessment expires three years from the date the tax return for such tax is filed. I.R.C. § 6501(a). I.R.C. § 6501(c)(4), however, provides an exception to the general three year statute of limitations on assessment. In accordance with this exception, the Secretary and the taxpayer may consent in writing to an agreement to extend the statute of limitations on assessment of any tax except estate tax.

In the case of Chapter 1 taxes (income taxes) and Chapter 3 taxes (relating to Form 1042 under I.R.C. §§ 1441 through 1464), attributable to individuals or corporations, Form 872, Consent to Extend the Time to Assess Tax, is used to extend the statute of limitations on assessment. Pursuant to IRM 5(10)37.2, Form SS-10 must be used to obtain the taxpayer's consent to extend the statutory period for assessing employment taxes.

ii. Tax Attributable to Partnerships

I.R.C. §6229(a) extends the period for assessing any Federal income tax attributable to any partnership item for the partnership's taxable year to the end of the 3-year period following the later of (1) the date on which the partnership return for such taxable year was filed, or (2) the last day for filing a return for that year. See also I.R.C. § 6501(n)(2) (providing that the period to assess partnership items can be extended as provided for under the provisions of I.R.C. § 6229). Pursuant to I.R.C. § 6229(b)(1)(B), the Service can extend the statute of limitations with respect to the assessment of partnership items by entering into an agreement with the Tax Matters Partner (or any other person authorized by the partnership in writing to enter into such an agreement) before the expiration of such period. With respect to income tax attributable to items of a partnership, Form 872-P, Consent to Extend the Time to Assess Tax Attributable to Items of a Partnership, is used to extend the statute of limitations on assessment.

A settlement agreement converts partnership items to nonpartnership items. I.R.C. § 6231(b)(1)(C). Once an item converts, the Service has one year to assess the converted item pursuant to I.R.C. § 6229(f). This office generally defines a settlement agreement as a mutual assent as to the treatment of partnership items which has been reduced to writing and executed by an individual with proper capacity to bind the partner. If the Service enters into a settlement agreement with any partner, partnership items are converted to nonpartnership items as of the date the Service and the partner enter into such agreement with respect to such items. For extending the time to assess such items, Form 872-F, Consent to Extend the Time to Assess Tax Attributable to Items of a Partnership or S Corporation That Have Converted Under Section 6231(b) of the Internal Revenue Code, is utilized.

b. The Consolidated Return Regulations: In General

Under the regulations promulgated pursuant to I.R.C. § 1502, consolidated returns may be made only with respect to Chapter 1 taxes (income taxes), but not with respect to Chapter 3 taxes (relating to Form 1042 under I.R.C. §§ 1441 through 1464), Chapter 21 taxes (FICA), or Chapter 23 taxes (FUTA). See Treas. Reg. § 1.1502-1 et seq. Thus, each corporation subject to withholding for U.S. source income of foreign persons must execute its own 1042 and corresponding Form 872 regardless of whether it joins in filing a consolidated income tax return. Likewise, each corporation subject to employment taxes must execute its own Forms 941 (FICA) and 940 (FUTA) regardless of whether it joins in filing a consolidated income tax return.

II. The Consolidated Return Groups - Form 872 (Income)

a. Language to be Used on Consents

i. [REDACTED] - Tax years [REDACTED]
through [REDACTED], inclusive. (Issue 8a)

ii. [REDACTED] -
Tax year [REDACTED]. (Issue 9a)

In the case of a consolidated group, guidance as to the appropriate entity to enter into a consent to extend the statute of limitations on assessment can be found in the consolidated return regulations. Treas. Reg. § 1.1502-1 et seq. Pursuant to the consolidated return regulations, the common parent is the sole agent for each member of the group, duly authorized to act in its own name in all matters relating to the income tax liability for the consolidated return year. Treas. Reg. § 1.1502-77(a). The common parent in its name will give waivers and any waiver so given shall be considered as having been given or executed by each such subsidiary. Treas. Reg. § 1.1502-77(a). Unless there is an agreement to the contrary, an agreement entered into by the common parent extending the time within which an assessment of income tax may be made for the consolidated return year shall be applicable to each corporation which was a member of the group during any part of such taxable year. Treas. Reg. § 1.1502-77(c).

The common parent remains the agent for the members of the group for any year during which it was the common parent, whether or not consolidated returns are filed in subsequent years and whether or not one or more subsidiaries have become or have ceased to be members of the group. See Treas. Reg. § 1.1502-77(a); Southern Pacific v. Commissioner, 84 T.C. 395, 401 (1985). Accordingly, as a general rule, the common parent remains the proper party to extend the statute of limitations for any taxable year for which it was the common parent, as long as it remains in existence.

Since [REDACTED] survived the merger (as currently named [REDACTED]), this is the proper entity to extend the statute of limitations for the taxpayer [REDACTED] (E.I.N. [REDACTED]) for the tax years [REDACTED] through [REDACTED], inclusive, as well as for the taxpayer [REDACTED] (E.I.N. [REDACTED]) for the tax year [REDACTED]. The name of the taxpayer appearing on the Form 872 should be as follows for the tax years [REDACTED] through [REDACTED], for both [REDACTED] ([REDACTED] through [REDACTED]) and [REDACTED] ([REDACTED]):

" [REDACTED] (E.I.N. [REDACTED])
[REDACTED], formerly known as [REDACTED]
[REDACTED], (E.I.N. [REDACTED]),
formerly known as [REDACTED]
(E.I.N. [REDACTED]).*"

In addition, at the bottom of the page, the following language should be added with respect to the tax years [REDACTED] through [REDACTED] (not [REDACTED]):

"*This is with respect to the consolidated tax liability of the [REDACTED]
[REDACTED] consolidated group (E.I.N. [REDACTED])
for the tax year ____."

The following language should be added with respect to the tax year [REDACTED]:

"*This is with respect to the consolidated tax liability of the [REDACTED]
[REDACTED] consolidated group (E.I.N. [REDACTED]) for the tax year [REDACTED]."

Note that the E.I.N. of [REDACTED]
[REDACTED] should also be entered in the upper right hand corner of each Form 872.

iii. [REDACTED] - Tax years [REDACTED]
through [REDACTED], inclusive. (Issue 1a)

When a common parent of a consolidated group ceases to exist, a different set of rules apply. Treas. Reg. § 1.1502-77(d) provides three rules for determining which corporation has authority to act in matters relating to the tax liability of the members of the group: (1) an entity designated by the old common parent can act as agent for the members of the group; (2) if the old common parent fails to make such a designation, the surviving members of the old group can designate an agent; or (3) if neither the old parent nor the surviving members make such a designation, the district director may deal with the old group members on an individual basis. Based upon the information provided, no designation of agent within the scope of Treasury Regulation § 1.1502-77(d) has been made. Accordingly, the Manhattan District Director may deal with the old group members on an individual basis. This may not be administratively practical, however, depending upon the number of affiliated subsidiaries. In addition, the revenue agent is in contact with representatives of [REDACTED]
[REDACTED], and it appears that an officer of this corporation is prepared to execute the extensions.

Temporary Treasury Regulation § 1.1502-77T provides alternative agents for the purpose of extending the statute when the common parent of a group ceases to be a common parent. Under this provision, a waiver obtained from any one of several alternative agents is deemed to be given by the agent of the group. Temp. Treas. Reg. § 1.1502-77T(a)(3). The alternative agents listed are as follows:

- (i) The common parent of the group for all or any part of the year to which the notice or waiver applies;
- (ii) A successor to the former common parent in a transaction to which section 381(a) applies;
- (iii) The agent designated by the group under Treas. Reg. § 1.1502-77(d); or
- (iv) If the group remains in existence under § 1.1502-77(d)(2) or (3), the common parent of the group at the time the waiver is given.

Temp. Treas. Reg. § 1.1502-77T(a)(4).

In the subject case, subparagraph (a)(4)(i) does not apply because [REDACTED] (E.I.N. [REDACTED]) is no longer in existence. Likewise, subparagraph (a)(4)(iii) does not apply because no agent appears to have been designated by the group. It is unclear from the available facts whether subparagraph (a)(4)(iv) would apply because it is unclear whether the merger constitutes a reverse acquisition within the meaning of Treasury Regulation § 1.1502-75(d)(3). Nevertheless, we believe that subparagraph (a)(4)(ii) applies since I.R.C. § 381(a) applies to the subject transaction.

I.R.C. § 381(a) applies, in part, to an acquisition of assets of a corporation by another corporation in a transfer to which section 361 applies, but only if the transfer is in connection with a reorganization described in subparagraph (A), (C), (D), (F) or (G) of I.R.C. § 368(a)(1). Therefore, if the subject merger is a tax-free reorganization within the meaning of I.R.C. §§ 361 and 368(a)(1), then I.R.C. § 381(a) will apply to the merger. If I.R.C. § 381(a) applies, [REDACTED] would be an alternative agent for [REDACTED] pursuant to Temporary Treasury Regulation § 1.1502-77T(a)(4)(ii) for the tax years [REDACTED] through [REDACTED], inclusive.

The parties to the merger claim that the merger qualifies as a tax-free reorganization under I.R.C. § 368(a)(1)(A). To qualify as a tax-free reorganization under I.R.C. § 368(a)(1), the following requirements must be met. First, the transaction must be structured as a Type A, C, D, F or G reorganization. I.R.C. § 368(a)(1). Second,

the restructuring must have been pursuant to a plan of reorganization. I.R.C. §§ 354 and 361. Third, there must be a business purpose for the reorganization. Gregory v. Helvering, 293 U.S. 465 (1935); Treas. Reg. § 1.368-1(b). Fourth, there must be continuity of business enterprise. Treas. Reg. § 1.368-1(d). Finally, there must be continuity of proprietary interest. Treas. Reg. § 1.368-1(e).

In the subject case, it appears that the above requirements have been met. First, the merger appears to have been structured as a Type A reorganization whereby [REDACTED] merged into [REDACTED] and all its outstanding stock was canceled. Second, the restructuring was pursuant to a plan of reorganization as evidenced by the Merger Agreement. Third, the business purpose of the reorganization appears evident from the language in the Merger Agreement: "the respective Boards of Directors of [REDACTED] and [REDACTED] have each determined that the Merger and the other transactions contemplated hereby are consistent with, and in furtherance of, their respective business strategies and goals." Fourth, there appears to be continuity of business enterprise since the Merger Agreement provides that [REDACTED] will continue the historic business of [REDACTED] or use a significant portion of its historic assets in a business as required by Treasury Regulation § 1.368-1(d)(1). Finally, the continuity of proprietary interest requirement is satisfied since in the merger each share of outstanding [REDACTED] stock was converted into the right to receive shares of [REDACTED] stock thus comporting with the requirements of Treasury Regulation § 1.368-1(e)(1). In view of the above, the merger appears to be a reorganization within the meaning of I.R.C. § 368(a)(1)(A).² Therefore, [REDACTED] would be the successor to [REDACTED] in a transaction to which I.R.C. § 381 applies. [REDACTED] would then be an alternative agent for the [REDACTED] for purposes of entering into an agreement to extend the statute of limitations on assessment for the [REDACTED] consolidated tax returns for the tax years [REDACTED] through [REDACTED], inclusive, pursuant to Temporary Treasury Regulation § 1.1502-77T(a)(4)(ii).

The name of the taxpayer appearing on the Form 872 should be as follows:

² We understand that the Examination Division does not challenge the taxpayers' contention that the merger qualifies as an I.R.C. § 368(a)(1)(A) reorganization.

" [REDACTED] (E.I.N. [REDACTED])
[REDACTED], formerly known as [REDACTED]
[REDACTED], (E.I.N. [REDACTED]),
formerly known as [REDACTED]
(E.I.N. [REDACTED]) as alternative agent for the
[REDACTED] consolidated return group (E.I.N. [REDACTED]
[REDACTED]), pursuant to Temp. Treas. Reg. § 1.1502-
77T, and as successor in interest to, by way of
merger with, [REDACTED] (E.I.N. [REDACTED]
[REDACTED]).*"

In addition, at the bottom of the page, the following language should be added:

"*This is with respect to the consolidated tax liability of the [REDACTED] (E.I.N. [REDACTED]) [REDACTED] consolidated group for the taxable years ____."

Note that the E.I.N. of [REDACTED] should also be entered in the upper right hand corner of each Form 872.

b. Authority to Enter Into Consents

i. [REDACTED] - Tax years [REDACTED] through [REDACTED], inclusive. (Issue 8)

ii. [REDACTED] - Tax year [REDACTED]. (Issue 9)

iii. [REDACTED] - Tax years [REDACTED] through [REDACTED], inclusive. (Issue 1)

The regulations under I.R.C. § 6501(c)(4) do not specify who may sign consents to extend the statute of limitations for income tax. Accordingly, the rules applicable to the execution of an original return have been deemed to apply to the execution of a consent to extend the time to make an assessment. Rev. Rul. 83-41, 1983-1 C.B. 399, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305.

In the case of a corporate return, I.R.C. § 6062 provides that a corporation's income tax returns must be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer, or any other officer duly authorized to act. Since the rules applicable to the execution of an original return also apply to a consent to extend the statute of limitations, any such consent may be signed by the above-noted individuals. Rev. Rul. 84-165, 1984-2 C.B. 305. Thus, in the subject case, any officer of [REDACTED] of the kind set forth in I.R.C. § 6062, supra, may sign these consents.

Since [REDACTED] merged with [REDACTED] and ceased to exist as a result of the merger, [REDACTED] will be signing the Form 872 for the [REDACTED] consolidated group in a dual capacity; as an alternative agent for the [REDACTED] consolidated group under Temporary Treasury Regulation § 1.1502-77T and as a successor in interest, by way of merger, with [REDACTED].

III. Subsidiaries Not Members of a Consolidated Group

a. Former Subsidiaries of [REDACTED] That Are Current Subsidiaries of [REDACTED] [REDACTED] - Form 872 (Form 1042 Withholding)

i. [REDACTED] - Tax years [REDACTED] through [REDACTED], inclusive. (Issues 3 and 3(a))

Based upon the information provided, subsequent to the merger of [REDACTED] and [REDACTED], [REDACTED] became a subsidiary of [REDACTED]. This entity did not cease to exist when [REDACTED] merged with and into [REDACTED], it simply became a subsidiary of the surviving corporation. However, since it was not a member of a consolidated group for the taxable years [REDACTED] through [REDACTED] with respect to I.R.C. §§ 1441 through 1464 withholding taxes, it must enter into a consent to extend the statute of limitations of assessment using its own name as the taxpayer and its own E.I.N. (not the name of the surviving parent corporation [REDACTED]).

The name of taxpayer on Form 872 should read:

"[REDACTED]"

The E.I.N. box in the upper right hand corner of the Form 872 should read [REDACTED] (the E.I.N. of [REDACTED]).

An appropriate officer of [REDACTED] may execute the consents pursuant to I.R.C. § 6062. Supra.

**b. Former Subsidiaries of [REDACTED]
That Are Not Current Subsidiaries of [REDACTED]
[REDACTED] - Form 872 (Form 1042 Withholding)**

**i. [REDACTED] - Tax years [REDACTED]
through [REDACTED], inclusive (Issues 5 & 5(a)).**

Although we do not have a copy of the merger agreement and have not been able to obtain one through public sources, the Stock Purchase agreement indicates and [REDACTED] has represented, that as a result of the [REDACTED] merger, [REDACTED] ceased to exist as it was merged into and became part of [REDACTED]. Without the specifics of the merger, we can only address the applicable law on a general basis. Both [REDACTED] and [REDACTED] are New York corporations. Generally, under New York Law, in a merger "the existence of one of the corporations is continued without the formation of a new corporation, the others being merged in it; the continuing corporation becomes the successor of the merged corporations subject to the rights and obligations imposed by the statute." In re Bergdorf's Will, 133 N.Y.S. 1012 (A.D.), aff'd, 206 N.Y. 309 (1912). Under this paradigm, the consent to extend the statute of limitations on assessment of withholding taxes would be executed by the surviving corporation, [REDACTED].

The appropriate language to use in the preparation of the consent to extend the time to assess for [REDACTED] for the years [REDACTED] through [REDACTED] (Form 872) with respect to I.R.C. §§ 1441 through 1464 withholding taxes is as follows:

"[REDACTED] (E.I.N. [REDACTED]), as successor in interest to, by way of merger with, [REDACTED] (E.I.N. [REDACTED])".

An appropriate officer of [REDACTED] may execute the consents pursuant to I.R.C. § 6062. Supra.

c. Former Subsidiaries of [REDACTED]
That Are Current Subsidiaries of [REDACTED]
[REDACTED] - Form SS-10 Consents

- i. [REDACTED] - All quarters
[REDACTED] through [REDACTED]. (Issues 2 and 2(a))
- ii. [REDACTED] - All
quarters [REDACTED] through [REDACTED]. (Issues 4 & 4(a))

[REDACTED], like [REDACTED], did not cease to exist when [REDACTED] merged with and into [REDACTED], it simply became a subsidiary of the surviving corporation. Likewise, it was not a member of a consolidated group with respect to employment taxes, and must enter into a consent to extend the statute of limitations of assessment using its own name as the taxpayer and its own E.I.N. (not the name of the surviving parent corporation [REDACTED]). Supra.

IRM 5(10)37.2 provides that Form SS-10 shall be used to obtain the taxpayer's consent to extend the statutory period for assessing employment taxes, including FICA and FUTA. Pursuant to Treasury Regulation § 31.6061-1, the employment tax return of a corporation may be signed by the president, vice president, or other principal officer. As discussed supra, the rules applicable to the execution of an original return are deemed to apply to the execution of a consent to extend the time to make an assessment. Rev. Rul. 84-165.

The caption on Form SS-10 for [REDACTED] should read as follows:

"[REDACTED]"

The E.I.N. box in the upper right hand corner of the Form SS-10 should read "[REDACTED]" (the E.I.N. of [REDACTED]). Any officer of [REDACTED] of the type set forth in Treasury Regulation § 31.6061-1 may sign the consent.

The caption on Form SS-10 for [REDACTED] should read as follows:

"[REDACTED]"

The E.I.N. box in the upper right hand corner of the Form SS-10 should read "[REDACTED]" (the E.I.N. of [REDACTED]). Any officer of [REDACTED] of the type set forth in Treasury Regulation § 31.6061-1 may sign the consent.

d. Former Subsidiaries of [REDACTED]
That Are Current Subsidiaries of [REDACTED]
- Form SS-10 Consents

i. [REDACTED] - All quarters [REDACTED]
through [REDACTED]. (Issues 10 & 10(a))

Based upon the information provided, subsequent to the merger of [REDACTED] and [REDACTED], [REDACTED] (formerly a subsidiary of [REDACTED]) became a subsidiary of the surviving corporation [REDACTED]. Since this subsidiary did not file as part of a consolidated return during the periods in issue with respect to employment taxes, it must enter into a consent to extend the statute of limitations on assessment of employment taxes using its own name and its own E.I.N. (not the name of the surviving parent corporation [REDACTED]).

The caption on form SS-10 for [REDACTED] should read as follows:

" [REDACTED] "

The E.I.N. box in the upper right hand corner of the Form SS-10 should read "[REDACTED]" (the E.I.N. of [REDACTED]). Any officer of [REDACTED] of the type set forth in Treasury Regulation § 31.6061-1 may sign the consent.

IV. Partnerships

a. [REDACTED] - Tax
years [REDACTED] through [REDACTED]. (Issues 6 & 6(a))

The preferred way to extend the statute of limitations under I.R.C. § 6229(a) is by the Tax Matters Partner entering into the agreement (Form 872-P). The Tax Matters Partner can extend the statute for all partners for partnership and affected items. The Internal Revenue Code also provides for any other person authorized by the partnership in writing to enter into such an agreement to extend the period for all partners. Temporary Treasury Regulation § 301.6229(b)-IT provides the requirements for such a person to extend the statute. The written statement must: (1) provide that it is an authorization for a person other than the Tax Matters Partner to extend the assessment period with respect to all partners; (2) identify the partnership and person being authorized by name, address, and taxpayer identification number; (3) specify the partnership's taxable year or years for which the authorization is effective; and (4) be signed by all persons who were general partners at any time during the year or years for which the authorization is effective. This

statement must be filed with the Service Center with which the partnership return is filed.

According to the information provided, the Tax Matters Partner is the general partner [REDACTED] (formerly a subsidiary of [REDACTED]). As such, it should sign the waiver on behalf of the partnership. It should use the name [REDACTED] because it survived the merger with no name change. The name of the taxpayer, however, should contain the name of the partnership and the E.I.N. box should contain the partnership's E.I.N.

The proper language to utilize on Form 872-P is as follows:

"[REDACTED]
(E.I.N. [REDACTED])"

An appropriate officer of the Tax Matters Partner [REDACTED] may execute the consent pursuant to I.R.C. § 6062.

b. [REDACTED] - Tax years [REDACTED]
and [REDACTED]. (Issues 7 & 7(a))

According to the information provided, the Service has entered into a settlement agreement as to certain ordinary income adjustments with respect to items of the partnership [REDACTED] which converted those items to nonpartnership items. Advice has been requested on the proper language to utilize and the proper party to execute a subsequent consent for partner [REDACTED] for these tax years.

The proper language to utilize on Form 872-F is as follows:

"[REDACTED] (E.I.N. [REDACTED])
[REDACTED], formerly known as [REDACTED] (E.I.N. [REDACTED]), as
successor in interest to, by way of merger with,
[REDACTED] (E.I.N. [REDACTED])"

An appropriate officer of [REDACTED] may execute the consent pursuant to I.R.C. § 6062.

PROCEDURAL CONSIDERATIONS

Please note that Section 3461 of the Restructuring and Reform Act of 1998, codified in I.R.C. § 6501(c)(4)(B), requires the Service to advise taxpayers of their right to refuse to extend the statute of limitations on assessment, or in the alternative to limit an extension to particular issues or for specific periods of time, each time that the Service requests that the taxpayer extend the limitations period. To satisfy this requirement, you may provide Publication 1035, "Extending the Tax Assessment Period," to the taxpayers when you solicit the consents. Alternatively, you may advise the taxpayers orally or in some other written form of the I.R.C. § 6501(c)(4)(B) requirement. In any event, you should document your actions in this regard in the case files.

In addition to the recommendations made herein, we further recommend that you pay strict attention to the rules set forth in the IRM. Specifically, IRM 4541.1(2) requires use of Letter 907(DO) to solicit a Form 872, and IRM 4541.1(8) requires use of Letter 929(DO) to return a signed Form 872 to the taxpayer. Dated copies of both letters should be retained in the case file(s) as directed. When the signed Forms 872 are received from the taxpayer the responsible manager should promptly sign and date them in accordance with Treasury Regulation § 301.6501(c)-1(d) and IRM 4541.5(2). The manager must also update the respective statutes of limitations in the continuous case management statute control files and properly annotate Form 895 or equivalent. See IRM 4531.2 and 4534. This includes Form 5348. In the event a Form 872 becomes separated from the file or lost, these other documents would become invaluable to establish the agreement.

Finally, we again remind you that this memorandum is subject to National Office review and approval. The advice contained herein should be considered preliminary, and should not be acted upon until we contact you concerning National Office comments. We will so contact you within two weeks of the date of this memorandum.

If you have any questions, please contact the attorney assigned to this matter, Daniel A. Rosen, at (212) 264-5473, extension 262.

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By: THEODORE R. LEIGHTON
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Noted:

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